Supreme Court, U.S.
FILED
98 205 MAY 4 1998
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1977

CLAUDE HOSCH,

Petitioner,

vs.

CHEMICAL RESIDENTIAL MORTGAGE COMPANY, Granville County and BANDAG, INC.,

Respondents.

Petition for Writ of Certiorari to the United Stated Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

CLAUDE HOSCH
Post Office Box 1767
Oxford, North Carolina
27565
(919) 693-4096

35 pp

QUESTIONS PRESENTED FOR REVIEW

1. *May the court fabricate a finding of facts by which a judgment may be made based on ERROR, 257 P. 2d 550, 555?*

2. *May the court disregard the WEIGHT OF EVIDENCE, 109 so. 2d 375, 378, and the fact that there is no opposing evidence on record?*

3. *May the court conceal a CONSPIRACY, 314 P. 2d b25, 631, by defendants to use fraud and misprision during foreclosure?*

4. *May the court abuse a proper RULE, 370 P. 2d 307, 309, and abuse of process, 32 A, 2d 413, 415?*

5. *May the court participate in a CONSIPRACY, 314 P. 2d 625, 631, and conceal the weight of evidence, 109 so. 2d 375, 378?*

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Petitioner, Claude Hosch, respectfully prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in this matter on February 11, 1998.

OPINIONS BELOW

The judgment of the United States Court of Appeals is attached as Appendix A. The judgment Order of the United States District Court is attached as Appendix B.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided the petitioner's case was February 11, 1998. A timely petition for rehearing was denied by the United States Court of Appeals on February 20, 1998; and a copy of the order denying rehearing appears as Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule: "Prescribed guide for action or conduct, regulation, or principle." 370 P. 2d 307,309

Abuse of Process: "Employment of the criminal or civil process for a use other than one which is intended by law; the improper use of process after it has been issued, that is, a perversion of it." 32A. 2d 413, 415

Weight of the Evidence: "A phrase indicating the relative value of the totality of evidence presented on one side of a judicial dispute, in light of the evidence presented on the other side." 109 so. 2d 375, 378

Conspiracy: "A combination of two or more persons to commit a criminal or unlawful act, or to commit a lawful ACT by criminal or unlawful means; or a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. It is essential that there be two or more conspirators; one cannot conspire with himself." 314 P. 2d b25, 631

Error: "An act involving a departure from truth or accuracy; a mistake." 257 P. 2d 550, 555

STATEMENT OF THE CASE

The United States Court of Appeals and the United States District Court departed from the usual and acceptable course of judicial proceedings and RULE 370 P. 2d 307, 309.

The United States Court of Appeals and the United States District Court based their judgments on findings of facts created by the Courts. There are no facts to support the Courts' judgments. There is no statement by the petitioner indicating a delinquent mortgage. There is proof of substantial payments for a current mortgage at acceleration of debt. There is proof that Chemical Residential Mortgage Company knew the mortgage was current at the acceleration of debt. The Clerk of Granville County Superior Court was given proof of current payment during foreclosure and refused the proof of payments. During the presentation by the petitioner of proof of payments, the recorder used to confirm transactions was stopped.

Bandag, Inc. admits to not responding to a lump-sum pension payout by written request. Petitioner's written request for a pension payout and the date the calculations were done and the

petitioner's attempts to attain a pension payout are on record. Federal regulation limits responses to written requests for payout to thirty days.

There is no opposing evidence on record, and the defendants are aware of the evidence on record.

The United States Court of Appeals and the United States District Court actions were not limited to Case No. 97-2308. In cases No. 96-2826 and 96-1104, the courts had contradicting findings from identical sets of circumstances. The United States Court of Appeals dismissed Case No. 96-1104 as untimely. The petition was signed for delivery on the deadline (Appendix C).

The judgments of the Courts are based on the Courts' ERROR 252 P. 2d 550, 555.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. THAT BEING WHETHER THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW ARE VIOLATED BY THE COURT, CAUSING THE LOSS OF PROPERTY AND LIBERTIES ASSOCIATED WITH OWNING PROPERTY.

The United States Court of Appeals has not only failed to correct a violation of due process of law by the lower Courts, but has supported the lower courts by not examining the evidence of record. Failing to mention the only material facts on record in its findings questions the Court's integrity as a fact-finding body.

A judgment based on credible facts is unlikely without intervention by the United States Supreme Court.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

CLAUDE HOSCH
Post Office Box 1767
Oxford, North Carolina
27565
(919) 693-4096

APPENDIX A – UNPUBLISHED SUMMARY JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2308

CLAUDE HOSCH,

Plaintiff – Appellant,

versus

BANDAG, INCORPRATED; GRANVILLE COUNTY SUPERIOR COURT; CHEMICAL RESIDENTIAL MORTGAGE COMPANY,

Defendants – Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-95-1083-5-BR)

Submitted: December 11, 1997
Decided: December 24, 1997

Before HALL and WILLIAMS, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Appendix A

Claude Hosch, Appellant Pro Se. Matthew Gray Styers, Jr., KILPATRICK STOCKTON, L.L.P., Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Claude Hosch appeals the district court's order dismissing Defendants Granville County Superior Court and Chemical Residential Mortgage Company as frivolous, and granting summary judgment to Bandag on Hosch's state law claims for fraud, financial harassment, and clerical misprision. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hosch v. Bandag, No. CA-95-1083-5-BR (E.D.N.C. Sept. 15, 1997). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:95-CV-1083-BR2

CLAUDE HOSCH,	)	FILED
	)	Sep 8 1997
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
BANDAG, INC.	)	
	)	
Defendant.	)	

This matter is before the court on defendant's motion to dismiss. The matter has been fully briefed and is now ripe for disposition.

Plaintiff was employed by defendant until his resignation on 26 May 1992. Defendant sponsored an employee pension benefit plan, in which plaintiff was a participant during his employment. At the time of his resignation, plaintiff requested a lump-sum payment of his accrued pension benefits. On 24 July 1992, defendant informed plaintiff that, based upon the terms of the Plan, he could elect to receive a lump-sum payment in lieu of future payments or he could wait until normal retirement age to receive his benefits. Plaintiff elected to receive the lump-sum payment, and on 12 August 1992 he received a payment of $10,345.43.

On 17 November 1995, plaintiff instituted the instant action alleging that defendant mishandled his request for the lump-sum payment, thereby causing him to become delinquent in his mortgage and ultimately loose his home in foreclosure. The complaint also alleged causes of action against Chemical

Residential Mortgage Corporation ("Chemical") for fraudulent foreclosure and the Clerk of Superior Court of Granville County, North Carolina ("Granville County") for disregard of proof that plaintiff was not delinquent in his mortgage payments. By Order dated 18 January 1996, this court dismissed as frivolous plaintiff's claims against Chemical and Granville County.

Plaintiff's amended complaint alleges that defendant mishandled his lump-sum pension payment "requested in writing on May 26, 1992, by asking for a calculation of a lump-sum pension payout rather than a lump-sum pension payout." (Am. Compl. at 2.)

II. STANDARD

Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6). However, in support of this motion, defendant submitted the declaration of Kathy Johnson ("Johnson Decl.") and the Bandag Pension Plan for Oxford Hourly Employees ("the Plan"). Both of these documents were considered by the court in resolving the motion discussed herein. Plaintiff submitted documents in support of his opposion to defendant's motion which were likewise reviewed by the court. Therefore, this motion will be treated as one for summary judgment pursuant to Fed. R. Civ. P. 56.

Summary judgment is approprate where there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

> A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party. Anderson v. Liberty Lobby, Inc., [477 U.S. 242, 248 (1986)]. In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. Id. at 255. The plaintiff is entitled to have the credibility of all his evidence presumed. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990), cert. denied, [498 U.S. 1109 (1991)]. The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, [477 U.S. 317, 325 (1986)]. The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. Anderson, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. Id.

Patterson v. McLean Credit Union, 39 F.3d 515, 518 (4th Cir. 1994) (quoting Shaw v. Stroud, 13 F. 3d 791, 798 (4th Cir. 1994), cert. denied, 115 S. Ct. 67 (1994), 115 S. Ct. 68 (1994)).

III. DISCUSSION

Plaintiff's stated cause of action is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1000 et. seq. ("ERISA"). ERISA states that "the provisions of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). The Supreme Court has interpreted this language broadly and does

not limit its scope to laws specifically designed to affect employee benefit plans. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1987).

The Fourth Circuit has held that claims for breach of contract, estoppel, misrepresentation, fraud, negligence and breach of duty of good faith are preempted by ERISA. See e.g., Makar v. Helath Care corp of Mid-Atlantic, 872 F.2d 80 (4th Cir. 1989); Sejaman v. Warner Lambert Co., 845 F.2d 66 (4th Cir. 1988). Further, the Fourth Circuit has determined that laws "relate to" employee benefit plans to the extent they are invoked for relief from injuries allegedly arising from the administration of such plans. Powell v. Chesapeake and Potomac Telephone Co., 780 F. 2d 419, 421 (4th Cir. 1985).

As plaintiff's claim is based upon the administration of an employee benefits plan, namely the payment of his lump-sum benefit, it is governed by ERISA. As such, any relief to which he would be entitled would necessarily be found in that statute. Plaintiff's complaint makes no mention of ERISA. However, because plaintiff is proceeding pro se, the court will construe his claim as having been made under the necessary statute.

Even construing plaintiff's claim as one having been made under ERISA, plaintiff fails to allege any genuine issues of material fact, and ERISA entitles defendant to judgment as a matter of law. ERISA provides for causes of action by participants and beneficiaries to challenge a denial of a claim for benefits or to allege a breach of a fiduciary duty by administrators of an employee benefit plan. 29 U.S.C. § 1109. Plaintiff does not seek a pyment of benefits, as he admits receipt of the lump-sum payment to which he was entitled. Instead,

plaintiff appears to be seeking consequential damages allegedly incurred as a result of the timing of his lump-sum payment.

Plaintiff alleges that defendant mishandled his request for a lump-sum distribution of his pension benefits by requesting a calculation of benefits before making the actual payment. Plaintiff does not allege that such action was violative of the terms of the Plan and does not challenge the terms of the Plan.

The Plan specifies that the timing of a lump-sum payment is to be determined by the amount of the payment and that payments of $3,500 or less are to be paid within an administratively reasonable period of not more than six months after severance from employment, and benefits in excess of $3,500, but not more than $30,000 not paid within six months may be paid at the employee's election as of the first of any month following the written application filed with the committee at least thirty days prior. (The Plan Art V, p.11); (Johnson Decl. ¶ 8.) On 26 May 1992, plaintiff submitted his written resignation in which he requested a lump-sum payment of his pension benefits. (Johnson Decl. ¶ 6.) According to Plan terms, defendant had to perform a calculation of plaintiff's payment amount prior to making the actual payment in order to determine the timing of the payment. Defendant performed the necessary calculation and on 21 July 1992, informed plaintiff of his ability to elect a lump-sum payment of $10, 345.43 to be paid not later than 15 August 1992. (Johnson Decl. ¶ 9.) On 24 July 1992, plaintiff executed the Pension Plan Election Form indicating his desire to receive the lump-sum payment with no further benefits. (Id. ¶ 10.) Defendant made the lump-sum payment to plaintiff on 12 August 1992, well within the

six-month time frame provided by the plan. (Id. ¶ 11.)

Plaintiff has failed to establish that there is a genuine issue as to any material fact surrounding the payment of his lump-sum pension benefit. Further, plaintiff has failed to allege a cause of action under ERISA and defendant is entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is GRANTED, and this action is hereby DISMISSED.

This 8 September 1997.

s/W. Earl Britt
W. EARL BRITT
United States District Judge

ch/b/krh

APPENDIX C—LETTER FROM THE PETITIONER TO THE UNITED STATES COURT OF APPEALS NO. 96-1104 AND NO. 96-1135; ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT NO. 96-1104; MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION NO. 5:94-MC-91; ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION NO. 5:96-CV-894-BR(2); ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT NO. 96-2826

July 29, 1996

Clerk's Office
U.S. Court of Appeals
1100 East Main St.
Richmond, Va 23219

RE: Appeal of No. 96-1104 Hosch v. N.C. Industrial Comm.
Appeal of No. 96-1135 Hosch. V. Granville Cnty.

Dear Sir:

In the plaintiff's judgment, one or more of the following situations exist as described in the above "Purpose" section:
1) In the matter of No. 96-1104 the magistrate judge and district court overlooked the fact that on June 2, 1992 Bandag, Inc. and the N.C. Industrial Comm. Conspired and agreed to not examine the medical evidence, giving rise to mischaracterization of evidence by the deputy commissioner and a disregard by the deputy commissioner of perjury by Bandag, Inc. in testimony and cross-examination, and that

Bandag, Inc. had knowledge of the deputy commissioner's June 22, 1992 decision on or before June 10, 1992 and a disregard for all of the above by the full commission; implicating conspiracy, aiding and abetting and accomplices, clearly intentional and by design. Accomplice – 233 P.2d 347; aid and abet – 24 A. 2d 85, 87; conspiracy – Model Penal Code § 5.03.

2) The eleventh Amendment is rooted in the "sovereign immunity doctrine and was intended to overrule Chisolm v. Georgia. 2 U.S. (2 Dall.) 419 (1973). 134 U.S. 1, 5; the amendment has been interpreted to permit suits against state officials in federal court for injunctive and declaratory relief based on federal law 209 U.S. 123, 150; sovereign immunity has been partially abrogated by the judicial decisions 115 N.W. 2d 618 and by the tort claims act which waives immunity for intentional torts 28 U.S.C. § 1346(b); which waives immunity in this case.

3) Bandag, Inc. being an accomplice makes them liable for the identical offense charged against the defandant; 233 P. 2d 347; Bandag, Inc. actively, knowingly, intentionally, purposefully assisted the N.C. Industrial Comm. And determining how much process is due would include Bandag, Inc's. participation, 233 P 2d 347.

4) In the matter of No. 96-1135, judgment was made regarding Granville Co. Superior Court and Chemical Residential Mortgage Co. on Jan. 26, 1996 according to my records making the matter appealable.

In this matter, the district overlooked the fact that there is proof of mortgage payments and proof of all the elements of fraud.

Appendix C

5) The district court created the appearance of a delinquent mortgage through mischaracterizations, absent of material facts to make his judgment on Jan. 26, 1996, disregarding the material facts or record.

6) In both No. 96-1104 and No. 1135 the district court overlooked the weight of the evidence 109 so. 2d. 375, 378; and ultimate facts 74 N.E. 2d 563, 567, which contain the elements of conspiracy, fraud, gross negligence, harassment, loss of health, loss of income, loss of property, loss of gainful employment and inadequate medical treatment and discrimination on the job due to health.

I appeal both No. 96-1104 and No. 96-1135 on the grounds stated in this document.

Very Truly Yours,

s/Claude Hosch – Plaintiff

DOMESTIC RETURN RECEIPT
4a. Article Number: P 254 139 630
5. Received by: (no name)
6. Signature: (not legible)
7. Date of Delivery: 8/2/96

Apendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE
(804) 771-2213

August 2, 1996

Claude Hosch
P. O. Box 1767
Oxford, NC 27565

Re: 96-1104 Hosch v. NC Industrial Comm
CA-94-91-MC-5

96-1135 Hosch v. Granville Cnty
CA-94-95-MC-5

Dear Mr. Hosch:

Enclosed is a copy of an order filed 8/2/96 in this case.

Sincerely,

BERT M. MONTAGUE
Clerk

By: /s/Merline Smith-Taylor
Deputy Clerk

cc: David Daniel

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 2, 1996

No. 96-1104
CA-94-91-MC-5

CLAUDE HOSCH

Plaintiff – Appellant

v.

NORTH CAROLINA INDUSTRIAL COMMISSION;
BANDAG, INCORPORATED

Defendants – Appellees

No. 96-1135
CA-94-95-MC-5

CLAUDE HOSCH

Plaintiff – Appellant

v.

GRANVILLE COUNTY SUPERIOR COURT;
CHEMICAL RESIDENTIAL MORTGAGE
COMPANY; BANDAG, INCORPORATED

Defendants – Appellees

ORDER

Appendix C

The appellant has filed an untimely petition for rehearing.

This Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing in banc.

The Court denies the petition for rehearing as untimely filed.

For the Court – By Direction

/s/ Bert M. Montague
CLERK

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 9, 1996

No. 96-1104
CA-94-91-MC-5

Hosch v. NC Industrial Comm

No. 96-1135
CA-94-95-MC-5

Hosch v. Granville Cnty

MANDATE

The judgment of this Court dated 7/18/96 takes effect today.

BERT M. MONTAGUE
CLERK

Appendix c

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE
(804) 771-2213

August 20, 1996

Claude Hosch
Q. O. Box 1767
Oxford, NC 27565

Re: 96-1104 Hosch v. NC Industrial Comm
CA-94-91-MC-5

96-1135 Hosch v. Granville Cnty
CA-94-95-MC-5

Dear Mr. Hosch:

We have received your second motion for reconsideration.

This Court's Local Rule 40(d) states that, except for timely suggestions for rehearing in banc, cost and attorney fee matters and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

This office is returning your second motion pursuant to the provisions of Local Rule 40(d).

Appendix C

I enclose for your information a sheet outlining the procedures for applying to the Supreme Court of the United States for a writ of certiorari.

Yours truly,

BERT M. MONTAGUE
Clerk

By: /s/ Shirley J. Beasley
Deputy Clerk

Enlosure(s)

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:94-MC-91

CLAUDE HOSCH, Petitioner	)	FILED
	)	DEC 2 1996
v.	)	
	)	
N.C. INDUSTRIAL COMMISSION and BANDAG, INC., Respondents	)	MEMORANDUM AND RECOMMENDATION

On remand of this case by the Fourth Circuit Court of Appeals petitioner's complaint has been filed in forma pauperis. It is now before the court on frivolity review under 28 U.S.C. § 1915(d) (1988).

This action is against the North Carolina Industrial Commission and Bandag, Inc. It alleges that the Deputy Commissioner who heard plaintiff's worker's compensation case failed to consider certain evidence and "mischaracterized" evidence in his ruling; that his ruling was not supported by evidence; that the full commission "failed to act as a 'fact finding body'"; and that the record on appeal to the N. C. Court of Appeals was misplaced and his case was dismissed. This complaint makes no allegations against Bandag, Inc., although a companion action does. The prayer for damages states:

> I should be awarded $1,800,000.00 for civil rights violation and the

deprivation resulting from the actions of the state (sic) of North Carolina in the matter of I.C. file no. 026481.

A judgment against the N. C. Industrial Commission would have to be paid from the treasury of the State of North Carolina and so his action against that State agency amounts to an action against the State itself. Claims in federal court for money damages against a State are barred by the Eleventh Amendment. Pennhurst State Sch. & Hosp. v. Halderman, 456 U.S. 89 (1984). There are no allegations of any kind in this action against Bandag, Inc.

Accordingly, IT IS HEREBY RECOMMENDED that this complaint BE DISMISSED as frivolous.

This the 17th day of November, 1995.

s/Alexander B. Denson
Alexander B. Denson
United States Magistrate Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION
No. 5:96-CV-894-BR(2)

CLAUDE HOSCH,	)	
Plaintiff,	)	
v.	)	
	)	ORDER
BANDAG, INC.,	)	
Defendant.	)	

This cause is now before the court on Plaintiff's Motion to Proceed in Forma Pauperis under 28 U.S.C. § 1915. From Plaintiff's affidavit, the court concludes that the qualifies for in forma pauperis status, and the Motion is therefore GRANTED.

However, because indigent plaintiffs are not deterred from litigation by a filing fee, the court may dismiss an informa pauperis action if it determines that it is frivolous or malicious, fails to state a claim upon which relife can be granted, or seeks monetary damages from an entity that is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). A claim having no arguable basis in law or in fact may be dismissed as frivolous. Neitzke v. Williams, 490 U.S. 319 (1989).

Plaintiff's action alleges a conspiracy by the Defendant, his former employer, to manipulate his claim before the North Carolina Industrial Commission and ultimately cause its dismissal. He also alleges that the Defendant defrauded its workers' compensation insurance carrier in order to prevent coverage of its employees, including him. Finally, he alleges that the Defendant "repeatedly stopped me from working due to my health, without financial aid

to replace income." Plaintiff has filed a previous action in this court against the Defendant and the North Carolina Industrial Commission arising from the same events at issue here, which was dismissed as frivolous on December 20, 1995. Hosch v. North Carolina Industrial Comm'n, No. 5:94-MC-91 (E.D.N.C. 1995). The Fourth Circuit affirmed the dismissal on July 18, 1996. Hosch v. North Carolina Industrial Comm'n, No. 96-1104 (4th Cir. 1996).

Plaintiff bases his new allegations in part on legal theories of tort, negligence, conspiracy, perjury, and fraud. These are not federal causes of action. Furthermore, because Plaintiff is a citizen of the State of North Carolina, there is no basis for diversity jurisdiction under 28 U.S.C. § 1332. Nonetheless, state law claims are cognizable in federal court even in the absence of diversity of citizenship if a valid basis for federal question jurisdiction exists and the court exercises its supplementary jurisdiction under 28 U.S.C. § 1367.

Plaintiff raises three federal claims. He alleges that his employer's actions violated his rights under the ninth and fourteenth amendments to the United States Constitution and the Americans with Disabilities Act, 42 U.S.C §§ 12101-12213 ("ADA"). The ninth amendment does not confer any substantive rights, but is rather intended to prevent the implicit abrogation of other rights belonging to the people merely because those rights were not included in the constitution. Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991); Charles v. Brown, 495 F. Supp. 862, 863-64 (N.D. Ala. 1980). In addition, the Defendant is a private entity, and Plaintiff has not described any basis upon which it could be considered a state actor, as the fourteenth amendment

requires. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991). These constitutional claims are clearly frivolous.

By alleging that the Defendant "repeatedly stopped me from working due to my health," and with the aid of the mandatory liberal construction of pro se complaints, Haines v. Kerner, 404 U.S. 519 (1972), Plaintiff has stated a claim under the ADA. His complaint can be construed to indicate the he is a "qualified individual with a disability," as defined in the ADA, and that his employer has discriminated against him on that basis. See 42 U.S.C. § 12112. However, like other employment discrimination laws, the ADA requires recourse to the Equal Employment Opportunity Commission as a precedent to filing a civil action. 42 U.S.C. § 12117; McCullough v. Branch Bankibg & Trust Co., 35 F.3d 127, 131 (4th Cir. 1994). Plaintiff's pro se status may entitle him to liberal construction of his allegations, but it does not excuse him from compliance with the substance of the laws under which he wishes to proceed. Plaintiff's ADA claim must be dismissed because it is time-barred.

In summary, Plaintiff's Motion to Proceed in Forma Pauperis is GRANTED. However, his federal claims are frivolous, and there is no basis for federal jurisdiction over his remaining state law claims. Accordingly, this action is DISMISSED as frivolous.

Appendix C

SO ORDERED, this the 2 day of December, 1996.

s/W. Earl Britt
W. EARL BRITT
UNITED STATES
DISTRICT JUDGE

I certify the foregoing to be a true and correct Copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

By s/Jolie Skinner
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 30, 1997

No. 96-2826
CA-96-894-5-BR-2

Hosch v. Bandag, Incorporated

MANDATE

The Judgment of this Court dated 3/18/97 takes effect today.

PATRICIA S. CONNOR
CLERK

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 22, 1997

No. 96-2826
CA-96-894-5-BR-2

CLAUDE HOSCH
Plaintiff - Appellant

v.

BANDAG, INCORPORATED
Defendant - Appellee

ORDER

---

appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

Appendix C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2826

CLAUDE HOSCH,

Plaintiff - Appellant,

versus

BANDAG, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-96-894-5-BR-2)

Submitted: March 13, 1997

Decided: March 18, 1997

Before HALL, ERVIN, and WATKINS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Claude Hosch, Appellant Pro Se.

Appendix C

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Appellant appeals the district court's order denying relief on his civil complaint under 28 U.S.C. § 1915 (e) (1994), amended by Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). We have reviewed the record and the district court's opinion and find that this appeal is frivolous. Accordingly, we dismiss the appeal on the reasoning of the district court. Hosch v. Bandag, No. CA-96-894-5-BR-2 (E.D.N.C. Dec. 6, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED